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No. 91-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TALLADEGA COUNTY BOARD OF EDUCATION, ITS INDIVIDUAL MEMBERS DAN LIMBAUGH, GAY LANGLEY, LARRY MORRIS, BEULAH GARRETT, CINDY ALLRED, AND ITS SUPERINTENDENT DR. LANCE GRISSETT,

Petitioners,

v.

QUINTON ELSTON, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED BLACK CHILDREN IN TALLADEGA COUNTY, ALABAMA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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Questions Presented for Review

Respondents disagree with Petitioners' characterization of the issues which are presented on the record of this matter:

1. No issue with respect to the application of Fed. R. Civ. P. 52(a) or the teaching of this Court's ruling in *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (Petitioners' Questions 1 and 3) arises on this record because the Court of Appeals has neither reviewed nor set aside the findings of fact of the district court; if, on remand from the decision below, the district court reinstates its findings of fact, they will be subject to review pursuant to Rule 52(a) on any new appeal that may be taken from the district court's judgment on remand.

2. A "harmless error" issue (Petitioners' Questions 2 and 4) may be constructed on this record, but it is wholly insubstantial and does not warrant plenary review by this Court.

3. Petitioners' final "Question Presented" (No. 5) suggests a form of disposition of this matter on the merits by this Court which not only fails to justify a grant of *certiorari* (the matter of appropriate disposition following plenary review by this Court arising in every case, *see* 28 U.S.C. § 2106), but Petitioners' suggested disposition would also deny Respondents the opportunity to obtain a ruling from the Court of Appeals on the claims of legal error by the district court that they raised below but that have not yet been considered by the Court below.

Table of Contents

Page

Questions Presented for Review i

Table of Authorities iii

Statement of the Case 1

REASONS WHY THE WRIT SHOULD BE DENIED 4

Conclusion 11

Table of Authorities

Cases:

Anderson v. Bessemer City, 470 U.S. 564 (1985) ..... i, 5

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 7n

Blatchford v. Native Village of Noatak, 501 U.S. ___, 115 L. Ed. 2d 686 (1991) 9-10

Cooter & Gell v. Hartmarx Corporation, 496 U.S. ___, 110 L. Ed. 2d 359 (1990) 5n

Johnson v. Home State Bank, 501 U.S. ___, 115 L. Ed. 2d 66 (1991) 10

McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984) 7

NLRB v. Erie Resistor Corporation, 373 U.S. 221 (1963) 10

Table of Authorities (continued)

Page

Cases (continued):

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 5n

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) 6n

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) .. 2n

United States v. Lane, 474 U.S. 438 (1966) 7n

Statutes and Regulations:

28 U.S.C. § 1291 8

28 U.S.C. § 2106 ..... ii, 8

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* 2

34 C.F.R. §§ 100 *et seq.* 2

Rules:

Fed. R. Civ. P. 11 ..... 5n

Fed. R. Civ. P. 52 ..... i, 5, 6

Sup. Ct. R. 10 ..... 5, 8

Sup. Ct. R. 15 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-346

TALLADEGA COUNTY BOARD OF EDUCATION, ITS INDIVIDUAL MEMBERS DAN LIMBAUGH, GAY LANGLEY, LARRY MORRIS, BEULAH GARRETT, CINDY ALLRED, AND ITS SUPERINTENDENT DR. LANCE GRISSETT,

Petitioners,

v.

QUINTON ELSTON, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED BLACK CHILDREN IN TALLADEGA COUNTY, ALABAMA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

Statement of the Case

This civil action was filed in 1988 challenging a number of decisions and policies of the Talladega County, Alabama Board of Education that plaintiffs claimed were racially discriminatory and violative of their rights under the First and Fourteenth Amendments to

the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and its implementing regulations, 34 C.F.R. §§ 100 *et seq.*[1] The district court dismissed the First Amendment and pendent state claims two weeks after the complaint was filed and entered judgment in favor of the defendants following a trial in the summer of 1989 (Pet. App. A-26). Plaintiffs appealed, raising eight issues[2] involving the pre-trial dismissal of three counts of their Complaint, the post-trial ruling on the remaining claims, and the propriety of interlocutory district court rulings on the scope of discovery, admission of counsel and joinder of an additional party defendant. On April 30, 1991, the Court of Appeals held that the district court had abused its discretion in two of its interlocutory rulings, vacated the district court's judgment, and remanded the case with directions

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[1]Plaintiffs (Respondents here) also sought to pursue pendent state claims under Alabama statutory and decisional (contract) law. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 721-29 (1966).

[2]The statement of Issues Presented for review to the Court of Appeals from the Brief for Appellants below is reprinted *infra* at pp. 1a-3a.

> to grant the motion for leave to amend, grant the motion for admission *pro hac vice*, permit such additional discovery as may be necessary and conduct such additional evidentiary hearings as determined appropriate by the court.

(Pet. App. A-3.) The Court of Appeals neither sustained nor rejected the remaining claims made on appeal by the plaintiffs.

Because the issues sought to be raised in this Court by Petitioners relate to the propriety of vacating and remanding the case to the trial court on the basis of the interlocutory errors identified by the Court of Appeals, Respondents will not describe the underlying factual controversy in this case, nor summarize the reasons why we believe the district court's factual findings and judgment were incorrect. We do wish to make clear, however, that Respondents disagree vigorously with the Board of

Education's characterization of the merits and of the evidence.[3]

Reasons Why The Writ Should Be Denied

No issues of substance warranting plenary consideration of this case in its present posture are raised

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[3]The most flagrant misrepresentation of the evidence made by the Board appears at pp. 5-6 of the Petition, where it is suggested that

> [o]ne of the main issues was the Board's elementary school plan; during the trial the *plaintiffs'* expert admitted on cross-examination that this plan was ". . . a good plan . . . a pretty good plan."

The "elementary school plan issue" to which Petitioners refer was the Board's decision to *close* the elementary grades of the Talladega County Training School and reassign pupils in those grades to a new facility to be constructed. The cross-examination testimony of plaintiffs' expert witness that is excised and quoted in the Petition had to do with the *remodeling* to be done at the Training School *following* the transfer of the elementary grades; the complete response of the witness is set forth below:

> THE COURT: What's a good plan?
>
> THE WITNESS: That they've got a good start on remodeling for a K through -- for a seven through twelve junior/senior high school at the Talladega County Training School site. The plan I saw this morning looks like a pretty good plan. It's a beginning. I don't think it is going to do the whole job as we've already mentioned that.

(Tr. 418.)

by Petitioners. In particular, none of the considerations supporting the granting of *certiorari* to which this Court has directed the attention of practitioners, *see* Sup. Ct. R. 10, are implicated by the ruling below.

1. Petitioners seek to construct an argument based upon Fed. R. Civ. P. 52(a) and this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985). However, the Court below did not "vacate" or "set aside" the district court's findings of fact nor restrict the district court's ability on remand to find the same facts, if that is warranted.[4] Unlike in the cases cited by Petitioners, the Court of Appeals neither discussed the factual evidence nor articulated a view of the proof different from that described by the district court.[5] In no sense was the Court of Appeals' *judgment* grounded upon an interpretation of the

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[4]See the remand directions of the Court of Appeals quoted *supra* p. 3 and set out at Pet. App. A-3.

[5]*See Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. ___, 110 L. Ed. 2d 359 (1990), also cited by Petitioners, this Court reviewed and summarized its holdings in *Bessemer* and *Swint* in the course of affirming a Court of Appeals ruling that had applied them on an appeal from the imposition of sanctions under Fed. R. Civ. P. 11.

factual record on the merits of plaintiffs' claims, much less upon such an interpretation reached without proper consideration of Rule 52 and this Court's decisions. Thus, granting the writ in this matter will not bring any Rule 52 issues before this Court. *See* Sup. Ct. Rule 15.1.

2. Petitioners' "harmless error" arguments are equally unavailing. Plaintiffs were denied the right to litigate this case with counsel of their choice[6] and to seek relief against a party whose involvement in some of the claimed discriminatory practices was revealed during the process of discovery. These errors had an impact upon the district court's ruling,[7] and the Court below remanded so that the trial court might reconsider its ruling after correcting those

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[6]The district court limited the admission *pro hac vice* of out-of-state counsel to one attorney. *See Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968).

[7]For example, the district court denied relief sought by plaintiffs with respect to "zone jumping" on the ground, *inter alia*, that the Talladega County Board of Education had "few, if any, avenues available to it" to prevent other districts from accepting County school district residents into their systems (Pet. App. A-22 - A-23 ¶¶ 22-23). Plaintiffs sought to join one such receiving district, the Talladega City district, as a party, and to obtain relief from the Court that would restrict "zone jumping" from County schools to City schools.

errors. That is quite different from *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984), the case principally relied upon by Petitioners, because the Court of Appeals' decision in *McDonough*, unlike the ruling below, *compelled* a new trial.[8] In any event, the decision below (finding abuses of discretion by the district court and vacating its judgment to allow correction of these errors) is dependent upon the unusual and highly particular facts of this case. It neither conflicts with other Courts of Appeals' decisions nor presents a situation likely to be often repeated and so demanding the plenary attention of this Court.

3. Finally, Petitioners' suggestion that review is warranted in order that this Court may consider whether to "reinstate the judgment of the District Court," *see* Pet. at i, 12, is nonsense. By definition, the question of what should be the disposition of a judgment given plenary

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[8]Similarly, the criminal decisions cited by Petitioners involved a Court of Appeals ruling requiring retrial, *United States v. Lane*, 474 U.S. 438 (1986), and a district court ruling dismissing an indictment, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Furthermore, *McDonough* presented significant questions about the manner of selecting juries in federal civil suits, an important factor supporting this Court's grant of review in that case which is lacking here.

review by this Court, *see* 28 U.S.C. § 2106, furnishes no independent ground for review separate from the existence of some other meritorious question arising in the case. Indeed, "questions presented" that will merit review by this Court must necessarily involve issues *decided* by a lower court. *See* Sup. Ct. Rule 10. But nothing in the Court of Appeals' decision here speaks to the matter of disposition by this Court following a decision to grant review.

Even more serious, the disposition suggested by Petitioners would deny Respondents' right to the appellate review provided by 28 U.S.C. § 1291. As noted above, Respondents presented three kinds of issues to the Court of Appeals in this case: (a) questions as to the propriety of the district court's pre-trial dismissal of some of the claims raised in their Complaint; (b) questions as to the propriety of the district court's interlocutory rulings on, *inter alia*, admission of counsel *pro hac vice* and joinder of an additional party defendant; and (c) questions about the correctness of the district court's judgment rendered after trial on the remaining claims in the Complaint. The Court

below held that the district court had abused its discretion in making two rulings in category (b) and vacated its judgment with directions for further proceedings. It did not reach the issues in category (a) or category (c), inasmuch as it was clearly unnecessary to do so in light of its remand. Hence, should the district court reinstate its rulings following completion of the remand proceedings, the issues in categories (a) and (c), as well as the undecided issues in category (b), may be raised on a subsequent appeal.

Petitioners' suggested disposition of this matter -- having this Court reinstate the district court's judgment -- would deny Respondents the right to obtain appellate review of these issues[9] and would raise grave questions of due process. If Petitioners are entitled to anything, they are entitled at best to a remand to the Court of Appeals so that the remaining questions raised on Respondents' appeal may be considered and adjudicated. *See, e.g., Blatchford v.*

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[9]Clearly, an attempt by Respondents to raise such issues by petitioning for *certiorari* from the judgment below would have foundered for the simple reason that none of the questions that would be sought to be presented for review have been *decided* below.

Native Village of Noatak, 501 U.S. ___, ___, 115 L. Ed. 2d 686, 700 (1991)("The Court of Appeals of course did not address this point, and we leave it for that court's initial consideration on remand"); *NLRB v. Erie Resistor Corporation*, 373 U.S. 221, 237 (1963)("We reverse the judgment of the Court of Appeals and remand the case to that court since its review was a limited one and it must now reach the remaining questions before it"); *cf.*, *e.g.*, *Johnson v. Home State Bank*, 501 U.S. ___, ___, 115 L. Ed. 2d 66, 77 (1991)("neither court addressed the issues of good faith or feasibility. We also decline to address those issues and instead leave them for consideration on remand").

Conclusion

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Nos. 89-7777 and 89-7917

QUINTON ELSTON, et al.,

Plaintiffs-Appellants,

vs.

TALLADEGA COUNTY BOARD OF EDUCATION, et al.,

Defendants-Appelleees.

On Appeal from the United States District Court
for the Northern District of Alabama

BRIEF FOR APPELLANTS

* * *

Issues Presented

1. Whether the district court erred in ruling, with respect to Count II under the Fourteenth Amendment, that plaintiffs had not by a preponderance of the evidence shown that any of the challenged decisions or practices were tainted by discriminatory intent.

2. Whether the district court erred in ruling, with respect to Count III under Title VI of the Civil Rights Act of 1964, and the regulations promulgated thereunder, that

plaintiffs had not established a prima facie case that any of the challenged practices had a disparate impact on blacks and that defendants had shown legitimate, non-discriminatory reasons for the decisions and practices in question.

3. Whether the district court erred in refusing to require defendants to provide discovery regarding any matter prior to school year 1985-86.

4. Whether the district court erred in dismissing Count I of the Complaint for breach of contract on the ground that enforcement of an agreement made in a related case could be pursued only in that litigation, although that litigation had been dismissed.

5. Whether the district court erred in dismissing without explanation Count IV of the Complaint challenging as violative of the First Amendment the Board of Education's policy precluding the recording "in any manner" of its public meetings.

6. Whether the district court erred in refusing to exercise pendent jurisdiction over Count V under Ala. Code

§ 36-12-40 for defendants' refusal to provide plaintiffs with copies of public documents.

7. Whether the district court erred in denying plaintiffs' motion to add Talladega City Board of Education as a party on the interdistrict transfer claim and in awarding the Talladega City Board of Education $5,188 for complying with a discovery subpoena.

8. Whether the district court erred in denying admission pro hac vice of two attorneys for plaintiffs from the NAACP Legal Defense Fund on the ground that if plaintiffs prevailed it would place an undue burden on the taxpayers of Talladega County.